(1)

IN THE

Supreme Court of United States

OCTOBER TERM, 1942.

No. 874

319 US #2
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THOMAS H. SWOPE AND VIRGINIA McALPINE, PETITIONERS AND APPELLANTS BELOW,

VS.

KANSAS CITY, KANSAS, a municipal corporation; ROY WHEAT, FRANK BROWN and FRANK H. HOLCOMB, County Commissioners of Wyandotte County, Kansas; UNION PACIFIC RAILROAD COMPANY, a corporation; and the MINNESOTA AVENUE, INC., a corporation, RESPONDENTS AND APPELLEES BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Wm. H. McCamish,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To The Honorale The Chief Justice and the Associate Justices of The Supreme Court of The United States:

Your petitioners, Thomas H. Swope and Virginia McAlpine, in support of their petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Tenth Circuit,

entered December 31st, 1942, affirming the judgment of the United States District Court for the District of Kansas, respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was an action for a declaratory judgment (R. 7) brought in the District Court of the United States for the District of Kansas by your petitioners against Kansas City, Kansas, a municipal corporation, Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas; Union Pacific Railroad Company, a corporation; and the Minnesota Avenue, Inc., a corporation, involving the following facts and issues:

In 1859 the owners of the townsite of Wyandotte, Kansas, now Kansas City, Kansas, filed a plat of said townsite with the Register of Deeds. On the plat appeared the outlines of a tract of land at the junction of the Kaw or Kansas River and the Missouri River (R. 55). This tract was about 100 acres in extent, and on the plat bore the legend "Levee" (R. 55), and on the back of the plat, under the heading "Public Grounds," appeared the words, "The Levee," and describing its location, corresponding in this respect to the plat (R. 55).

When the plat was filed, the then Statute of Kansas provided that such filing of such a townsite plat should vest the fee to parcels of land therein expressed, named or intended for public use in the County where the land was situate, "In trust and for the uses therein named expressed or intended, and for no other use or purpose." (Act approved February 11, 1859—Gen. St. Kansas 1935 —Chapter 12-406).

In 1929 the State of Kansas enacted a law that provided that cities of the class of Kansas City, after reserving a strip of ground along the river front for public landing and the erection thereon of public docks and wharfs, should have the power and authority to lease the remaining parts of their levees, whether acquired by dedication or otherwise, for terms not in excess of 99 years, and for various use purposes, including industrial establishments (Rev. St. Kansas 1935—Chapter 13, 1074 to 1077).

Thereafter, Kansas City, Kansas erected on the levee property a perishable food market at the cost of five million dollars (R. 33). This is the food market with which this Court dealt in the case of *Union Pacific Railroad Company* v. *United States*, (313 U. S. 450, 61 S. C. 1064, 85 L. Ed. 1512). A photograph of it appears in the record (R. 83), where also appears a view of the railyard built by respondent, Union Pacific Railroad Company, to serve the food market under a long term lease (R. 68, et seq.). After the decision of this Court in the above case, Kansas City, Kansas leased the food terminal for up to 30 years to respondent, The Minnesota Avenue, Inc. and for any lawful use purpose (R. 85).

The food terminal, and the Union Pacific railyard cover between them probably three-fourths of the levee property (Exhibits, R. 77 and 83).

The Petitioners herein are, respectively, citizens and residents of the State of Missouri, and of the State of Illinois. The respondents are citizens and residents of the State of Kansas. The value of the matter in controversy in the District Court meets the jurisdictional requirements.

The petitioners are heirs at law of various of the seven dedicators of this levee property (R. 35 to 50).

They contended in their complaint (R. 7), and by their evidence, that the Kansas Act of 1929, and the uses to which most of the property has since been put, constitute, between them, a full and lawful abandonment, by State and dedicatee, of the dedication purposes in respect to the land so used: that the use of such part of the levee, for levee or street or dyke purposes or, in truth, for any other public use, has been definitely and finally abandoned. The petitioners contended below that, in view of such abandonment, they, as heirs of the dedicators, should be compensated by the payment of the *reasonable naked land value* of the land so abandoned for public use. And they prayed for a declaratory judgment so declaring their rights. In the alternative, your petitioners asserted that the present uses of the levee constitute purprestures.

The Judgment of the District Court.

The trial court, finding the above facts to be true (R. 20, et seq.) found the legal conclusions, drawn by the petitioners from those facts, to be unsound, and declared that the petitioners had shown no right to relief, and rendered judgment accordingly (R. 26).

The Judgment of the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the judgment of the trial court, in an opinion filed December 31, 1942, and published in 132 Fed. (2d) 788.

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Section 1, 43 Stat. 938 (28

U. S. C. A. 347 a), and under the same Act, C. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. 350).

The Date of the Judgment to be Reviewed.

The judgment of the Circuit Court of Appeals for the Tenth Circuit, affirming the judgment of the District Court for the District of Kansas, was entered on the 31st day of December, 1942. This petition, with supporting brief, and the certified record, are filed within three months next after the final judgment sought here to be reviewed.

Statement of the Nature of The Case and The Rulings Bringing The Case within the Jurisdiction of This Court.

The nature of the case has been heretofore stated. The Circuit Court of Appeals ruled: (1) That what has been done to this levee property does not constitute an abandonment of it for public levee purposes; (2) That such new uses will promote river traffic and enhance the value of the property for public levee purposes; (3) That such new uses are within the discretionary powers of defendant city as trustee of this public trust property.

The jurisdiction of the Federal Court of this cause has not been questioned. Each of the rulings of the Circuit Court of Appeals is reviewable by this Court under the appropriate statutory provisions noted.

Cases Believed to Sustain the Jurisdiction of This Court.

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the Writ of Certiorari.

C.

THE QUESTIONS PRESENTED.

(1) Where property has been dedicated for a specific public purpose and under such a statute as the Kansas Act of 1859, and the State thereafter, by Statute, empowers the trustee of such public trust, after reserving for the dedication use part of the dedicated property, to lease for its own profit, the remainder thereof, to private enterprises under leases not in excess of 99 years, does this constitute "lawful abandonment", for the dedication purposes, of such leasable land?

(3) Where property is dedicated for public levee use, is the erection thereon of costly and permanent buildings specially designed for a wholesale perishable food market or terminal, and leaseable to anyone for any lawful enterprise, together with the building of a railyard specially designed to serve such buildings, promotive of and consistent with the dedication purposes and contract?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In ruling that, upon land dedicated for a public levee, the erection thereon by the dedicatee of costly and permanent buildings specially designed for a perishable wholesale food terminal, and the use of such buildings for private enterprise of every lawful nature by the lessees of the dedicatee, is promotive of and consistent with, the uses to which the land was dedicated, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, to-wit:

McAlpine v. *Railway Company,* 68 Kansas 207, 75 Pac. 73.

Kansas City v. *Woods,* 117 Kansas 141, 230 Pac. 79.

(2) In ruling that where property is dedicated by the owners to a specific public use, the dedicatee, as trustee of that public trust, has the discretionary power, as such trustee, to devote the property to alien or foreign uses for the pecuniary advantage of the trustee and others, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, to-wit:

State ex rel. v. *City of Manhattan,* 115 Kansas 794, 225 Pac. 85.

Commissioners v. *Lathrop,* 9 Kansas 453.

McAlpine v. *Railway Company,* 68 Kansas 207, 75 Pac. 73.

Kansas City v. *Woods,* 117 Kansas 141, 230 Pac. 79.

(3) In ruling that, in the erection of the perishable food terminal and the leasing of it for various private uses and purposes, the City respondent was acting within its powers as a trustee, and not in its proprietary capacity, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, to-wit:

State ex rel. v. *City of Kansas City,* 151 Kansas 2, 98 Pac. (2d) 101.

Commissioners v. *Lathrop,* 9 Kansas 453.

State ex rel. v. *City of Manhattan,* 115 Kansas 794, 225 Pac. 85.

McAlpine v. *Railway Company,* 68 Kansas 207, 75 Pac. 73.

Kansas City v. *Woods,* 117 Kansas 141, 230 Pac. 79.

(4) In ruling that where land is, by private dedication, dedicated for public levee use, the dedicatee trustee may grant the exclusive use of any part of such land to private uses, the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, to-wit:

Juneau Ferry Co. v. *Morgan,* 236 Fed. 204 (9th Cir.).

(5) In so construing the opinion in *Kansas City* v. *Woods,* 117 Kansas 141, 230 Pac. 79, as to constitute that opinion stare decisis against the petitioners herein, and as conclusive against their claim and position in this case, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with an applicable decision of this Court, to-wit:

Chase National Bank v. *City of Norwalk,* 291 U. S. 431, 54 S. C. 475, 78 L. Ed. 894.

Conclusion.

Each of the questions presented is of grave public importance. Unless the opinion below is reviewed, the law relating to dedications of land for public purpose, and the law of abandonment and misuser of dedicated land, will be left in confusion and doubt. Whether land dedicated for a specific public purpose may be applied to purposes of private use and profit of the dedicatee and others, is a question of fundamental importance in law and to the cause of common justice. So, also, is the question whether a decision in an amicable action (*Kansas City* v. *Woods, supra*), deciding matters of right between one of the parties (Kansas City, Kansas) and per-

sons not party to the proceedings (dedicators), may, under the Federal Constitution, constitute stare decisis against the latter.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the records and proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket as Number 2562, Thomas Swope, et al., Appellants, v. Kansas City, Kansas, et al., Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this Court; and your petitioners pray that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Tenth Circuit, filed with this petition, may be treated as a return to said Writ of Certiorari; and your petitioners pray that they may have such other and further remedies as to the Court may seem appropriate and in conformity with law.

THOMAS H. SWOPE AND
VIRGINIA MCALPINE,
Petitioners.

WM. H. MCCAMISH,
Counsel for Petitioners,
Kansas City, Kansas.

IN THE

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Tenth Circuit, filed December 31st, 1942, is a final judgment and is reported in 132 Fed. (2d) 788.

B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These grounds appear as part of the foregoing Petition for Writ of Certiorari, and are hereby adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

This statement also appears as part of the foregoing Petition for Writ of Certiorari, and is adopted and made a part of this brief.

D.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in ruling that the opening of the greater part of the dedicated land, under statutory authority, to private uses, unlimited in character, did not, as to such part of the land, constitute a lawful abandonment of the dedication use and purpose.

(2) The Circuit Court of Appeals erred in ruling that the above private uses are promotive of and consistent with the purpose of the dedication.

(3) The Court of Appeals erred in ruling that in devoting the levee tract to such private uses the respondent city acted within its discretionary powers as trustee of the levee property.

(4) The opinion of the Circuit Court of Appeals is in direct conflict with *Juneau Ferry Co.* v. *Morgan,* 236 Fed. 204 (9th Circuit).

(5) The Court erred in relying upon the case of *Kansas City* v. *Woods,* 117 Kan. 141, 230 Pac. 79, as stare decisis, although these petitioners were not parties to that litigation.

E.

SUMMARY OF THE ARGUMENT.

Point I.

When the State of Kansas in 1929 enacted the Act whereby the City was authorized to divide this levee property into two parts, and to allocate the riverward part to "public landing and public docks and wharf", and the remainder to industrial uses, the State, the high guardian of the public and public rights, abandoned the public use in such remainder. This statute, although pressed upon the attention of the trial court and the appellate court, was ignored by both courts.

Point II.

The private commercial and industrial activities on the levee property, disclosed on this record, are not levee uses or promotive of such uses.

Point III.

The respondent City in developing the levee tract was not acting as trustee for the public, but as a private owner for its own benefit, and that of Union Pacific and other tenants of the City.

Point IV.

The opinion of the Circuit Court of Appeals is in direct conflict with the opinion in Juneau Ferry Co. v. Morgan, 236 Fed. 204 (9th Cir.).

Point V.

Under the Federal Constitution a person may not be deprived of his contract rights through an adjudication of those rights in an action between other parties, to which action he was a stranger.

ARGUMENT.

Point I.

The Kansas Act of 1929, though ignored below, is of decisive importance. This act *defines* true levee uses, allocates part of the tract to such uses, and allocates the residue to non-levee uses. As clearly as the English language can convey thought and purpose, the State has spoken to Kansas City, and said: "Preserve the public use along the river to the extent you deem wise, use any remainder for your own purpose and benefit." The State, all powerful in that respect, cancelled the public use lien on most of this land and made the trustee thereof a *beneficiary*. The City accepted the gift and proceeded with its plan. That plan this Court has considered.

> (*Union Pacific Railroad Co.* v. *United States*, 313 U. S. 450, 61 S. C. 1064, 85 L. Ed. 1512).

It was carried out. It was one, said the Supreme Court of Kansas, which looked to "a *permanently* successful *municipal* enterprise—in its quasi—*private or proprietory* capacity."

> (*State ex rel.* v. *City of Kansas City*, 151 Kan. 2, 98 Pac. (2d) 101).

This late Kansas case and this Kansas statute demonstrate, we argue, that the State abandoned the public use in part of the tract, and the City took it over to its own private advantage. This part of the land was abandoned for public levee use. It was abandoned for any and all other public purposes. A member of the public, unless invited, would now be a trespasser if found on this tract.

It seems idle to argue that property exploited for private ends can ever serve a public trust. The buildings and railyard are permanent in character, built for a long tomorrow. The Statute of 1929 authorizes industrial use leases up to 99 years. The statute would authorize consecutive 99 year leases. That means perpetuity. As said in *Commissioners* v. *Lathrop,* 9 Kan. 453: "The use contemplated is not temporary but permanent."

The State could not put this land, dedicated for a public use, to any other use, public or private, without the consent of the dedicators. (*State ex rel.* v. *City of Manhattan,* 115 Kan. 794, 225 Pac. 85).

The State could, however, abandon this public use (*McAlpine* v. *Railway Company,* 68 Kan. 207, 75 Pac. 73; 18 C. J. 125; 26 C. J. S. 153; *Young* v. *Board,* 51 Fed. 585; *Porter* v. *Bridge Co.,* 200 N. Y. 234, 93 N. E. 716) or devote the property to alien uses, but this only upon the terms of compensating the dedicators (26 C. J. S. 140, 154, 155), and such compensation is implicit in the 1929 Act, for the dedication purpose has been erased by abandonment.

The Kansas Legislature gave power to the defendant city to lease this dedicated levee to private industrial enterprises. It is our position that neither the city nor the legislature, acting separately or together, could, in defiance of the contract of dedication and the rights of the dedicators thereunder, and without compensation, divert this levee to inconsistent, alien, non-levee uses. *State ex rel.* v. *City of Manhattan,* 115 Kan. 794, 225 Pac. 85. We contend further, however, that the Legislature may—and may so authorize a city—abandon any public use based upon a dedication. The vacating of dedicated highways and streets is a familiar example. And here the legislature granted the power—and the city accepted

it and acted on it—to waive and abandon the use of this levee for levee purposes, and to devote the levee to other activities. The result, we argue, was a *lawful abandonment* of the dedication uses, and the result of such abandonment is that the dedicators must be paid the reasonable value of the naked land so abandoned.

> "It would be unjust that the public should retain the use for any other purpose than the one for which it was dedicated."
>
> *Campbell* v. *Kansas City,* 102 Mo. 326, 344, 13 S. W. 897.

As to this very levee, the Supreme Court of Kansas has approved this rule: "Land dedicated to a particular purpose will revert to the dedicator when there has been a full and lawful abandonment of the use for which the dedication has been made or when the dedication has spent its force by the use becoming impossible—or so highly improbable as closely to approach the impossible."

(*McAlpine* v. *Railway,* 68 Kan. 207, 75 Pac. 73).

In the McAlpine case it was ruled that mere non-user will not cause reverter of dedicated land. It was also ruled that the mis-uses therein described would not cause such reverter for they could be removed by a court of equity. The mis-uses in the McAlpine case were of temporary nature. They were described in a later case as existing by "sufferance" (*Kansas City* v. *Woods,* 117 Kan. 141, 230 Pac. 79).

They were not founded as is the fact here, upon a legislative Act like that of 1929. There was hence no "lawful" abandonment. In the McAlpine case the *dedicatee* alone sanctioned the mis-use and drew this from the Court: "Certain it is that neither city nor county could give away the rights of the public—by authorizing its use for unwarranted purposes."

Only the Legislature, of course, can abandon a public trust. It has done so here. The Circuit Court of Appeals notes that in the McAlpine case it was ruled that "levee" uses included streets for access to the levee and likewise "dykes". The answer to that is that the Act of 1929, and the building program that followed, has made the use of that much of the tract *for all those three uses*, "impossible—or so highly improbable as closely to approach the impossible" (McAlpine case), and hence amounts to "abandonment" for each and all of those three public use purposes.

Point II.

The Circuit Court of Appeals ruled that no "abandonment" occurred here for that the present uses are promotive of the public use of all of this tract as a levee. In support the McAlpine case is cited and quoted, also *Kansas City* v. *Woods*, 117 Kan. 141, 230 Pac. 79.

As we read the McAlpine opinion, and as it has been viewed by the many non-Kansas courts that have cited it, that opinion does not rule that temporary factories, squatters, or encroaching rail tracks are true levee uses. On the contrary, had that been the view of the Court it would not have gone beyond that point, decisive of the entire controversy, to waste time and space upon the considerations upon which the case in truth was *decided*. Nor would the Court have gone out of its way to denounce municipal sanctions of purprestures and point to the remedy.

As to the Woods case, the Woods plan fell through even though the Kansas courts gave it approval. But what was the Woods plans and purpose? The plan was that Woods Bros. should do what the City had failed to do; viz: establish a levee in being, a Kansas City port

in being. For a short term of years Woods Bros. were to retain control of the levee, subleasing various parts to others, including industrial plants. What sort of industries is not disclosed in the opinion. They are only casually referred to. Some industry would not be in conflict with levee uses, say, warehouses and elevators for temporary storage in river-land transportation. During the term of the lease every part of the tract was to be subject to the paramount demands of navigation and levee. At the end of the term Woods Bros. and their sub-lessees were to remove, and leave a finished levee, a port, in actual being. To secure the building of such a port was the professed aim of all concerned in asking the Court for its approval. That purpose and that alone, filled the mind of the Court. And so the Court, while strongly adhering to the horn book law that "property dedicated for public use can neither be sold, *leased*, or otherwise diverted from the original purpose", concluded to apply "a rule of reason", and considered that, under "the facts" before it, the plan it approved was a valid "exercise of the administrative discretion vested in the City Government", and that the transaction was not "*commercial* rather than governmental."

This Court (*Union Pac. R. R.* v. *United States*, 313 S. W. 450, 61 S. C. 1064, 85 L. Ed. 1512) and the Kansas Supreme Court (*State ex rel.* v. *Kansas City*, 151 Kan. 2, 98 Pac. (2d) 101), have both stamped the present enterprise as one purely commercial.

The plan in the Woods case was to create and preserve an improved levee. The food market—rail yard plan blocks such a purpose permanently.

The Circuit Court of Appeals also cites and relies on *State ex rel.* v. *Dreyer*, 229 Mo. 201, 129 S. W. 904. That case is the farthest point that the courts have

reached in upholding misuser of dedicated levees. It sanctioned "passing" railtracks on the levee at Hannibal, Missouri. The Dreyer case, however, also decided that the levee could not lawfully be occupied "with depots, warehouses or other structures", and that there could be no "switching upon said tracks" permitted. In the instant case, about a fifth of this levee is now in control of respondent railway company. The site was donated and intended for the promotion of river transportation. The inherent antagonist of such transportation, its great rival, is the railway. And now the respondent uses the site for rail borne goods that come from no boats and go to no boats. The site is being used not only for the rail yard, but the greater part is covered with buildings in which every kind of private enterprise is pursued. Yet it is ruled, below, that all this is promotive of the levee purpose. That means that *any* use is a levee use, within the terms of this dedication and the Act of 1859. That is why a question of great importance is here involved. If the Circuit Court of Appeals is right, then every dedication for a *specific* purpose becomes automatically a dedication for *all* purposes. The result will be that the law of abandonment, diverter and misuse of dedicated property will be stored away for good, and carry with it many notable decisions. A "levee" is a place devoted to the loading and unloading of freight, and the reception and discharge of passengers to and from vessels in adjacent rivers or other navigable waters. (*New Orleans* v. *United States*, 10 Peters 662). The following uses have been held to be misuses of levees: "A permanent and substantial depot" (*Barney* v. *Keokuk*, 94 U. S. 324); "Sidings and switches" of a railway company, not pertaining to the company's river traffic. (*C. R. I. & P. R. Co.* v. *People*, 222 Ill. 427, 78 N. E. 790); a grocery store (*Gardiner* v. *Tisdale*, 2 Wis. l. c. 188); a railway com-

pany's freight house (*City of St. Paul* v. *C. M. & S. P. Ry. Co.*, 63 Minn. 330, 68 N. W. 458); factories (*Sanborn* v. *Van Duyne*, 90 Minn. 215, 96 N. W. 41); a railroad company's bridge approach over the levee (*Louisville, et al. Ry. Co.* v. *City of Cincinnati*, 76 Ohio St. 481, 81 N. E. 983); a privately operated coal hoist (*Richard* v. *Flinn*, 189 Pa. 355, 42 Atl. 23); a lumberyard (*McCann* v. *Inhabitants*, 107 Me. 393, 78 Atl. 465); a city hall (*Streuber* v. *Alton*, 319 Ill. 43, 149 N. E. 577); a bathhouse (*Poole* v. *Commissioners*, 9 Del. Ch. 192, 80 Atl. 683); buildings (*Attorney General* v. *Tarr*, 148 Mass. 309; 19 N. E. 358); the railyard of a railway company (*Betcher* v. *Railway Co.*, 110 Minn. 228, 124 N. W. 1096); an ice house (*People* v. *Daxcee*, 136 App. Div. 400, 120 N. Y. S. 962); a privately owned and controlled grain elevator (*Belcher Co.* v. *Elevator Co.*, 82 Mo. 121).

All the law on the subject runs that a public levee is for the use of all members of the public, and cannot be diverted to private uses, for such necessarily would interfere with the free, perpetual, public and unrestrained use by the whole community.

Point III.

The Circuit Court of Appeals ruled that the acts of the city are well within its discretionary powers as trustee of this trust property. What we have said under Points I and II is likewise directed to this ruling and we call attention to the 1859 Act. Under that Act the City holds the levee property in trust for levee purposes, and only for that purpose. That Act controls this dedication contract. It is clear, as this Court and the Kansas Supreme Court have found to be the case, that the City, accepting the benefits of the 1929 Act, has shifted its status from that of a trustee of a

public trust to that of an unfettered owner. It has not been acting in any trust capacity. It and the Union Pacific have acted for their own pockets.

The opinion of the Circuit Court of Appeals lays stress upon the thought that pending the demand for levee use of this tract, it should be used for something and not left as a potential nuisance. This argument has been advanced without effect in defense of misuses of levees. (*City of St. Paul* v. *Railway Co.*, 63 Minn. 330, 63 N. W. 458; *Attorney General* v. *Tarr*, 148 Mass. 309, 19 N. E. 358; *City of St. Paul* v. *Railway Co.*, 65 N. W. 648).

If a dedicatee, for any reason, does not want to use the dedicated property for dedication purposes, the obvious thing to do is to turn back the gift.

And the 1929 Act and the City's acts thereunder, demonstrate that neither State nor City contemplated or intended any future levee use of the diverted tract. The State authorized successive 99 industrial purpose leases. The City, thus fortified, built non-levee buildings to last for ages. The City definitely decided that all its present and future needs for docks were filled when it built that tiny dock. Of course, it is always physically possible to raze these buildings and return the land to levee uses. No one would seriously have any faith in such a happening here, for every act of State and City point the other way. Such a possibility is, anyhow, no answer to the charge of abandonment, and no sufficient basis for the public trust to rest upon. For until the end of recorded time, throughout the future years of usurpation of this tract, the argument could and would be repeated that the land was not yet needed for levee uses. If that argument is sound there never could be any "abandonment" of

dedication uses. A purely fanciful and hypothetical restoration to levee use at some hypothetical future date is no answer to this fundamental breach of the dedication contract.

Point IV.

The opinion of the Circuit Court of Appeals conflicts with the opinion of *Juneau Ferry Co.* v. *Morgan,* 236 Fed. 204 (9th Cir.) where the Court said:

> "A town cannot lease a part of a public dock to a private concern, nor can a city which has condemned private property for use as a wharf lease it unconditionally for a term of years to be used in the prosecution of private business and for private gain."

On this record it is clear that under the present set up, and for the foreseeable future, the vast buildings on this tract will be filled with a locust swarm of private profit seekers.

Point V.

The opinion of the Circuit Court of Appeals interprets the Woods case opinion, *supra,* directly contrary to our interpretation of it. If the Court's interpretation is the correct one, then the use here against these petitioners of the Woods case as stare decisis raises a serious question under the Federal Constitution. It is this: Could the City, in a friendly action brought against it by the State, and to which action the dedicators were not made parties, secure an adjudication foreclosing any right of the dedicators? Could the City thus, escaping all risks that attend the securing of res judicata, secure the equally potent stare decisis?

Under the ruling in *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431, 54 S. C. 475, any of the levee

dedicators was "entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him." Elementary justice demands that litigants be not permitted to destroy the rights of a third party under a contract with one of the litigants. The petitioners have pleaded the impairment of obligation clause of the Federal Constitution, and Section One of the Fourteenth Amendment thereof. Neither of these may be violated by State action, whether legislative, executive or judicial. Such violations raise federal questions not within the rule in the *Erie-Tompkins* case, 304 U. S. 64.

We submit that under the ruling in *Chase National Bank* case, *supra,* the Woods case opinion, as construed by the Circuit Court of Appeals cannot be used against these petitioners.

ERRORS OF FACT IN THE OPINION BELOW.

1.

The opinion recites that the levee tract has grown by accretion to several times its original size. There is not a trace of evidence in the record to sustain this assertion. The accretions were to the east. The north, south, and west lines remained static. In the McAlpine case (*supra*) the Court found that the tract, when dedicated, was, as now, one mile long, and that it was 700 to 900 feet in width. An average of 800 feet in width, would make the tract about 100 acres in area, as compared with the 105 acres that the Court below, again without any evidence, asserts is the present area of the tract.

2.

The opinion below states that petitioners claim to be seized of such reversionary title. The petitioners

never made any claim other than that they ought in equity and good conscience to be paid the ground value of the land diverted.

Conclusion.

There are presented here questions of grave public importance. In this day of so many private dedications made for public purposes, it would be well that this Court review the law pertaining thereto.

Respectfully submitted,

WM. H. MCCAMISH,
Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 874

THOMAS H. SWOPE AND VIRGINIA McALPINE, *PETITIONERS AND APPELLANTS BELOW,*

VS.

KANSAS CITY, KANSAS, A MUNICIPAL CORPORATION; ROY WHEAT, FRANK BROWN AND FRANK H. HOLCOMB, COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS; UNION PACIFIC RAILROAD COMPANY, A CORPORATION; AND THE MINNESOTA AVENUE, INC., A CORPORATION, *RESPONDENTS AND APPELLEES BELOW.*

BRIEF OF UNION PACIFIC RAILROAD COMPANY, RESPONDENT (APPELLEE BELOW), IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

UNION PACIFIC RAILROAD COMPANY,
Respondent.

LILLARD, EIDSON, LEWIS & PORTER,
Topeka, Kansas,
Of Counsel.

T. M. LILLARD,
O. B. EIDSON,
Topeka, Kansas,

T. W. BOCKES,
T. F. HAMER,
Omaha, Nebraska,
Its Attorneys.

H. W. IVES & SONS, TOPEKA

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BRIEF OF UNION PACIFIC RAILROAD COMPANY, RESPONDENT (APPELLEE BELOW), IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioners contend that the Circuit Court of Appeals for the Tenth Circuit erred in affirming the decision of the District Court for the District of Kansas, holding:

(a) That there had been no abandonment by Kansas City, Kansas, of the tract of land dedicated as a Public Levee in 1859.

(b) Hence no reverter of the land to the petitioners as heirs of some of the original dedicators.

Petitioners' contention is that while the city has erected and is maintaining on this land whose area is in excess of 105 acres an adequate wharf for river shipping, a forfeiture should be declared because the city has also erected and leased under statutory authority a large river and rail terminal grain elevator, connected with the wharf by overhead grain carrier, a cold storage and ice manufacturing plant, a food terminal or wholesale market for the handling of agricultural products, railroad tracks to serve these municipally owned facilities, all being connected by rail and paved highways with the wharf, and all being found by the trial court to "constitute individually and as a whole facilities for use in interstate commerce by highway, rail and water transportation," (Finding 11, Record 25).

The plat, which was filed by the founders of the town, in so far as it covers the tract in controversy, was introduced as plaintiff's Exhibit 1, and appears at page 55 of the record. It will be noted from the plat that the area in controversy is designated by the single word "Levee." The language of the dedication which appears in the same exhibit is as follows:

> "Public ground. The levee extending from the northern boundary of the Ferry Tract to the northern boundary of the town, and from the front lots to the rivers."

An examination of the original plat (R. 55) and a comparison of the original levee area, as there shown, with plaintiffs' Exhibit No. 4 (R. 77) shows that the present area of river frontage now used as or open and available for wharfage uses is not greatly less than the entire area of the levee as originally platted.

The basic contention of the petitioners has been that the term "levee" is synonymous with "landing"; that any use of any portion of the immense area which has grown up through

the process of accretion must be confined to the loading and unloading of freight and the reception and discharge of passengers to and from vessels in the adjacent navigable waters.

THE USES "NAMED, EXPRESSED OR INTENDED" IN A DEDICATION IS A QUESTION OF LOCAL LAW TO BE DETERMINED BY DECISIONS OF THE COURTS OF THE STATE WHERE THE LAND LIES.

Each dedication of property for public purposes, whether made by deed or by the filing of a plat, constitutes a conveyance of an interest in land. Determination of the law applicable to conveyances of land has throughout the history of the common law been peculiarly a local question to be settled by the courts of each state. The *lex loci rei sitae* has always governed.

In the early case of *United States v. Crosby*, 7 Cranch 115, 3 L. Ed. 287, it was held "The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated." In another early case, *Keer v. Moon*, 9 Wheat. 565, 569, 6 L. Ed. 161, the Court said:

> "It is an unquestionable principle of general law, that the title to and the disposition of real property, must be exclusively subject to the laws of the country where it is situated."

In *DeVaughn v. Hutchinson*, 165 U.S. 566, 41 L. Ed. 827, the Court thus stated the principles which very appropriately must govern in the consideration of the present case:

> "It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. *United States v. Crosby*, 7 Cranch 115;

Clark v. Graham, 6 Wheat. 577; *McGoon v. Scales,* 9 Wall. 23; *Brine v. Insurance Co.,* 96 U. S. 627."

The rule that the law of the state where the land is located—both statutory and as established by judicial decisions—governs in all matters relating to titles, estates and conveyances of land has been uniformly recognized by all courts from the very beginnings of our country. This rule was fully recognized by this Court in *Swift v. Tyson,* 16 Peters 18, 10 L. Ed. 871.

Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, which overruled *Swift v. Tyson* as to the application of the local law in other matters, announced no new principle in so far as the law relating to real estate is concerned.

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS RIGHTLY APPLIED THE ESTABLISHED LAW OF KANSAS AS TO THE USES "NAMED, EXPRESSED OR INTENDED" IN A DEDICATION OF THIS CHARACTER.

Applicable Kansas Supreme Court decisions and the rules of law established thereby are set out in the trial court's finding of fact No. 12. (R. 25.)

The petitioners contend that the Kansas decisions (particularly *McAlpine v. Railway Co.,* 68 Kan. 207, 75 Pac. 73, and *Kansas City v. Woods,* 117 Kan. 141, 230 Pac. 79) have been misconstrued and misapplied by the courts below.

Both of these cases had to do with the scope of authorized uses of this very levee. The McAlpine case was brought by ancestors of the present petitioners, plaintiffs below. There is a lot of discussion in the McAlpine case about what constitutes such an abandonment as would bring about a reversion of property dedicated to public uses. We can find nothing

in that discussion itself, however, which supports the contention of petitioners that there has now been an abandonment. This is completely refuted by the trial court's finding No. 8 in the present case that the city has provided:

> "(a) A wharf or loading and unloading dock for boats, which is, so far as the evidence discloses, adequate for the present needs of river transportation" (R. 23).

The petitioners do not challenge this finding of the trial court. A study of the opinion shows that the real basis for the decision in the McAlpine case was that:

> "While a levee is a place for the landing of boats and commerce, it is much more than that" (68 Kan. 212).

The court held that the use then being made of the levee was within the purposes of the dedication. Following the assertion that the dedication was for "much more" than a boat landing, the Court, in the McAlpine case, enters upon its discussion of the question of what would constitute an abandonment. This discussion is prefaced by the following:

> "Giving to the word 'levee' the narrow construction contended for by plaintiffs (a construction which the court had already rejected), we proceed to inquire if the conclusion that there has been an abandonment and consequent reverter is warranted by the facts" (68 Kan. 212).

The Court then, after setting out a number of authorities, says on page 216:

> "There is nothing to be found in the evidence which goes to show that the use of the tract in question, *even were it limited to a boat landing* (a limitation which the court had already rejected), has become impossible; indeed the evidence shows to the contrary." (Emphasis ours.)

The Court then holds that there has been no abandonment, winding up the opinion with the following language:

> "that in this case no such condition was shown by plaintiff's evidence, *even if we take the narrow view that the dedication was only for the purpose of affording a landing-place for boats and for commerce carried on by river. We are further of the opinion that this narrow view may not be sustained—that the dedication was for other purposes as well;* and it may well be doubted that a reverter would necessarily follow the complete drying up of the Missouri River." (Emphasis ours.)

We therefore submit that the Kansas Supreme Court in the McAlpine case has given a binding construction of the intention of the dedicators of this levee property and that under this construction the levee property is "much more" than a boat landing and that, "the dedication was for other purposes as well."

It cannot be questioned that the Court held in *Kansas City v. Woods, supra,* that the city was acting within its power in giving a lease for a term of years, and the Court described the lease as follows:

> "The lease contemplates the diking the property to prevent recurrence of floods and submergence, the laying out of streets, the construction of sewers and paving, *the erection of industrial plants and warehouses,* and the construction of facilities for any river traffic which may materialize during the term of the lease—all consistent with and apparently helpful to and promotive of the use of the property as a public levee." (Emphasis ours.)

Of course, the present petitioners were not parties to that suit. Hence the principle of *res adjudicata* does not apply. If the petitioners were litigating the present case in the courts of Kansas, they might conceivably get the Kansas court to

reexamine the questions passed upon in *Kansas City v. Woods.* However, these petitioners elected to file their present suit in a federal court, a tribunal which is bound by the decision of the Kansas Supreme Court, on a somewhat different principle—the principle of *lex loci rei sitae,* and the similar principle announced by the Court in *Erie Railroad Company v. Tompkins,* 304 U.S. 64.

These decisions of the Kansas Supreme Court establish general principles of law. The Court had jurisdiction of the subject matter. In any later case in the federal courts, such as the case now before this Court, these general principles are binding pronouncements of the law of Kansas, whether or not the parties who seek to litigate similar questions in the federal courts were parties to the case in which the principles were announcd. If similar questions should later arise as to public levees in the cities of Leavenworth or Atchison, the previous decisions of the Kansas Supreme Court determining what uses a city might make of a tract of ground marked "levee" on a dedication plat, and dedicated as "Public Grounds," would stand as the settled law of the State of Kansas binding upon the parties to the Leavenworth or the Atchison case, certainly so if the suit be brought in the federal court.

If these earlier Kansas Supreme Court decisions have, as we contend, settled principles of law which defeat the petitioners' case, they are binding on the petitioners as well as on all future litigants, at least when the parties choose the federal courts as their forum, and there is then no question of constitutional law involved.

Is the vast acreage not presently needed for the narrow use which petitioners have in mind and which the Kansas Supreme Court has held does not measure the city's rights to be left idle and unused? Or is the city, with the approval of the legislature, justified in authorizing the use of this ex-

cess acreage for purposes which the city and the legislature, with the sanction of the highest court of the state, have deemed reasonably incidental to the strict and narrow use contended for by petitioners—the city always having the right to remove its lessees from the premises whenever public necessity may require? The question has been answered by the Kansas Supreme Court.

The trial court and the Circuit Court of Appeals correctly applied the law of Kansas. The petition for the Writ of Certiorari should be denied.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY,
Respondent

T. M. LILLARD,
O. B. EIDSON,
Topeka, Kansas,

T. W. BOCKES,
T. F. HAMER,
Omaha, Nebraska,

Its Attorneys.

LLILLARD, EIDSON, LEWIS & PORTER,
Topeka, Kansas,

Of Counsel.

Supreme Court of the United States

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BRIEF OF RESPONDENTS AND APPELLEES BELOW,

Kansas City, Kansas, a Municipal Corporation; Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas, and The Minnesota Avenue, Inc., a Corporation, in Opposition to Petition for Writ of Certiorari.

ALTON H. SKINNER,
City Attorney,
JOSEPH A. LYNCH,
Deputy City Attorney,
Both of Kansas City, Kansas,

Counsel for Respondents and Appellees Below, Kansas City, Kansas, a Municipal Corporation, Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas, and The Minnesota Avenue, Inc., a Corporation.

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Kansas City, Kansas, a Municipal Corporation; Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas, and The Minnesota Avenue, Inc., a Corporation, in Opposition to Petition for Writ of Certiorari.

This proceeding was originally filed in the United States District Court for the District of Kansas, First Division, by petitioners, and was brought to recover property dedicated as a public levee. Petitioners claimed to be heirs of some of the dedicators. Petitioners claimed that title reverted to them because of abandonment and misuse of the property.

After hearing the evidence, the trial court made findings of fact and conclusions of law, and entered judgment in favor of Respondents and against Petitioners (R. 20-26).

In the petition for writ of certiorari, petitioners set forth the following specifications of error intended to be urged (page 13):

> "(1) The Circuit Court of Appeals erred in ruling that the opening of the greater part of the dedicated land, under statutory authority, to private uses, unlimited in character, did not, as to such part of the land, constitute a lawful abandonment of the dedication use and purpose.
>
> (2) The Circuit Court of Appeals erred in ruling that the above private uses are promotive of and consistent with the purpose of the dedication.
>
> (3) The Court of Appeals erred in ruling that in devoting the levee tract to such private uses the respondent City acted within its discretionary powers as trustee of the levee property.
>
> (4) The opinion of the Circuit Court of Appeals is in direct conflict with *Juneau Ferry Co.* v. *Morgan,* 236 Fed. 204 (9th Circuit).
>
> (5) The Court erred in relying upon the case of *Kansas City* v. *Woods,* 117 Kan. 141, 230 Pac. 79, as *stare decisis,* although these petitioners were not parties to that litigation."

In their appeal to the Circuit Court of Appeals, Petitioners took exception to only some portions of certain of the findings of fact (R. 1, 2). For the convenience of the court we here set out in full the findings of fact, and italicize the portions excepted to by Petitioners (R. 20-26):

Findings of Fact.

1. In the year 1859 the dedicators of Wyandotte City, Kansas (now Kansas City, Kansas), being seven in

number, each owning a one-seventh interest in the town property, filed the Plat of said Wyandotte City, Kansas (now Kansas City, Kansas); that upon said Plat appeared, as a part of the ground dedicated to "Public Grounds," a plot of ground designated upon the said plat as "The Levee" and described in said plat as "extending from the northern boundary of the Ferry Tract to the northern boundary of the town, and from the front lots to the rivers"; that said plat was so filed, and is now, in Plat Book number 1, page 3, in the office of the Register of Deeds, Wyandotte County, Kansas, in Kansas City, Kansas; that through the filing of said Plat the said "Levee" property became and was dedicated to the public. That the said dedication was accepted by Wyandotte City and by Wyandotte County, Kansas, and defendant City, later, *built adequate and permanent dikes along* the river fronts of said "Levee Tract." That by such dedication and acceptance, and under the express provisions of Sec. 12406, G. S. Kan., 1935, which was in force at the time that said plat was filed the fee title to said Public Levee became vested in the County of Wyandotte, in the State of Kansas, but the dominion of said "Levee," and the control of the use of the said "Levee" became vested in said Wyandotte City, Kansas, now the City of Kansas City, Kansas.

2. That ~~Thompson~~ Thomas H. Swope, plaintiff herein, is a residuary devisee of Thomas ~~S.~~ H. Swope, one of the seven dedicators of the Levee in question, and said plaintiff has always been a citizen and resident of the state of Missouri. That Virginia McAlpine, plaintiff herein, is the widow of Robert McAlpine, who died in 1932, intestate and without issue, and who with his brother, still living, John McAlpine, were the sole heirs of Joel Walker, another of

the seven dedicators; that said Robert McAlpine and John McAlpine were also the heirs of one-half of the estate of another of the seven dedicators, to-wit: John McAlpine, who died intestate in or about the year 1872; that Virginia McAlpine is a citizen and resident of the state of Illinois, and has been such for many years.

3. That the matter in controversy or dispute, in this cause, exceeds the sum of $3,000, exclusive of interest and costs.

4. The platted limits of the Public *Levee* have *grown by accretion to several times their original proportions,* the area included in the Levee being now at least 105 acres.

5. Within a few years after the original dedication of the Levee, river transportation at Kansas City, Kansas, ceased entirely, and was not resumed until within the past ten years. During that period the Levee property, which is located close to the main business district of the City, was permitted to grow up in weeds and remained largely unused, although portions of it were, from time to time, used for railroad rights of way and for industrial purposes by lessees of the City.

6. Section 1, of chapter 43, enacted by the Legislature of the State of Kansas at its special session in 1933, authorized Kansas City, Kansas, to issue its revenue bonds to pay the cost of improving, constructing, reconstructing or repairing public levees, docks, wharves, river terminals, grain elevator terminal docks, and such storage, railroad and all other facilities which will make the publicly owned levee of such city convenient and accessible for use in connection with water transportation. Section 6 of that statute authorized the governing body of the city

to erect and construct on the Public Levee improvements and facilities authorized and mentioned in the Act, and to lease the same for a term not exceeding 99 years at such rental and upon such conditions as in the judgment of said governing body would be in the best interest of the city.

7. In 1937, the Kansas Legislature amended Section 1 of this statute by enactment of Chapter 135, which enlarged the provisions relative to the class of improvements that might be constructed upon the Public Levee and financed by the issue of revenue bonds, and provided that all such structures should be of such a character as in the judgment of the governing body of the City would be necessary and convenient for the accommodation of shipping by highway, pipe line, rail and water in connection with commerce or water transportation on navigable rivers adjoining the public levee.

8. Following the enactment of these statutes the defendant herein, Kansas City, Kansas, through issuing its own revenue bonds and with Federal Aid Funds, has spent sums in excess of five million dollars in improving the Public Levee by the erection of the following structures:

(a) A wharf or loading and unloading dock for boats, which is, so far as the evidence discloses, adequate for the present needs of river transportation.

(b) A large river-rail *grain elevator* terminal building owned by the defendant City, but leased to a corporation which handles the actual operation. This grain elevator is connected with the wharf by overhead grain carriers so that grain may be transferred to and from

boats on the river. It is also connected with the wharf or dock by railroad tracks and paved roadways.

(c) A cold storage and ice manufacturing plant, which is connected with the wharf, or dock, by railroad tracks and paved roadways.

(d) A *food* terminal or *wholesale market* for the handling of agricultural products, which *is connected with the wharf or dock by railroad tracks* and paved roadways.

(9) Defendant, *Union Pacific* Railroad Company, has leased from the City certain railroad tracks constructed by the City, and has constructed, itself, certain tracks and a switch yard upon the Levee property, being all under leases from and authority of defendant, Kansas City, Kansas, which *railroad tracks and switch yard constitute a connection between rail, river and highway traffic.* The trackage on the Public Levee, whether owned or operated by railroads, constitute facilities in interstate commerce *directly connected with and available for use in connection with water transportation on* the navigable *rivers* adjoining said Public Levee.

10. Various of the *structures* above described which have been erected by the defendant City *on the Levee* tract have been leased by the City to the defendant, Minnesota Avenue, Inc. The buildings constructed on the Public Levee, owned and operated by the City and The Minnesota Avenue, Inc., a managing agent for the City, in themselves *constitute facilities designed for and capable of being used as warehouses, and receiving depots in connection with water transportation on* the navigable *rivers* adjoining said Public Levee.

11. All of the *structures* erected upon said Public Levee, including the *railroad tracks* and buildings men-

tioned above, have been erected and leased for the purposes authorized by the Kansas statutes mentioned in Findings Nos. 6 and 7, *constitute individually, and as a whole, facilities for use in interstate commerce by* highway, rail and *water transportation.*

12. This Court takes judicial notice of the decisions of the Supreme Court of Kansas in the following cases where the Kansas Supreme Court considered the rights of the City in connection with the use of the Public Levee:

McAlpine v. *Railway Co.*, 68 Kan. 207, 75 Pac. 73.

Kansas City v. *Wyandotte County*, 117 Kan. 141, 230 Pac. 79.

State ex rel. v. *Kansas City*, 140 Kan. 471, 37 Pac. 2d 18.

Robertson v. *Kansas City*, 143 Kan. 726, 56 Pac. 2d 1032.

State ex rel. v. *Kansas City*, 149 Kan. 252, 86 Pac. 2d 476.

State ex rel. v. *Kansas City*, 151 Kan. 2, 98 Pac. 2d 101.

By these decisions of the Supreme Court of Kansas, the law of Kansas has been established upon the following points in relation to the Levee property:

I. That the nature of the use permitted under the dedication of this land as a "levee" is not restricted within the narrow bounds contended for by the plaintiffs; that much broader uses are authorized than as a mere place for loading and unloading river traffic—that the dedication was for other purposes as well (68 Kan. 212-217).

II. That misuse or non-use of the property for river transportation is not sufficient to justify reverter, unless its use for the dedicated purposes has become impossible, or so highly improbable as to become practically impossible (68 Kan. 208).

III. That it was not beyond the discretionary power of the city government to lease the levee property and grant a license for its use to a private corporation for a term of years for a money consideration (117 Kan. 141).

IV. That the erection of such structures on the public levee and the leasing of the same by the city constitute a valid exercise of the administrative discretion vested in the governing body of the city (117 Kan. 147).

V. That the only proper plaintiff in an action for injunctive relief against abuse of power by municipal officers is the State, or one of its officers charged with the responsibility of scrutinizing the acts of public officers or boards (143 Kan. 726).

13. The *evidence does not establish* that there has been *non-user or mis-user of the levee property.*

14. The complaint filed, and the evidence introduced, show that the legal title to the Public Levee of Kansas City, Kansas, was vested in Wyandotte County on the date the plat was filed, and that the dominion and control over said Public Levee is vested in the City of Kansas City, Kansas; that said Public *Levee is being used for the purposes named, expressed and intended in the dedication,* and that plaintiffs have no right, title or interest in said Public Levee.

Conclusions of Law.

1. The acts of the City in constructing improvements upon the levee and in leasing the same have constituted a lawful exercise of its powers by the governing body of the City.

2. Upon the facts and the law the plaintiffs have shown no right to relief.

3. Judgment should be entered for the defendants and disposing of the action with prejudice, at plaintiffs' costs.

4. The foregoing Findings of Fact and Conclusions of Law having disposed of the case on the merits, it is unnecessary to determine the procedural question of the sufficiency of parties plaintiff under Rule 19A.

RICHARD J. HOPKINS,
Judge.

We call the court's attention to the fact that petitioners in their appeal to the Circuit Court of Appeals, did not challenge, object or except to, findings of fact made by the trial court, numbered 6 and 7, by which findings the court found that the improvements made by the City of Kansas City, Kansas, on the Public Levee, were constructed and leased under the provisions of Chapter 43, Laws of Kansas, special session, 1933, and Chapter 135, Laws of Kansas, 1937, which amended Section 1 of Chapter 43, Laws of 1933, special session.

It is clear from such findings that the improvements were constructed under the laws above set out and not under the provisions of chapter 125, Laws of 1929, as petitioners now contend in their brief for writ of certiorari filed in this court.

We also call the court's attention to the fact that petitioners did not challenge, object or except to finding of fact No. 12, made by the trial court. By so failing to challenge, object or except to findings numbered 6, 7 and 12, petitioners cannot now be heard to complain of such findings.

In paragraph 12 of the findings of fact and conclusions of law made by the trial court, the trial court sets

forth a number of decisions made by the Supreme Court of Kansas, of which the trial court took judicial notice. The Public Levee of Kansas City, Kansas, was dedicated as such in 1857. We understand this transcript of record filed in the United States Circuit Court of Appeals is on file in the Supreme Court. Exhibit 1, at page 54 of the record, is a copy of the dedicatory clause and map of the Public Levee at the time of its dedication.

This action involves the title to real estate locally situated. In the case of *Swift* v. *Tyson*, 16 Pet. 1, 41 U. S. 1, 10 L. Ed. 871, decided in 1842, it was held that the 34th section of the Judiciary Act of 1789 reading as follows, to wit:

> "That the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

is limited in its application to state laws strictly local; that is, to the positive statutes of the state, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate.

In *Swift* v. *Tyson*, on page 18 of the original publication, the United States Supreme Court used this language:

> "The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construc-

> tion thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

The later case of *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, did not change the rule above quoted in the case of *Swift* v. *Tyson*, nor overrule the same. The rule in *Erie* v. *Tompkins* may be stated as follows:

> A federal court will follow the statutes and decisions of the highest court of the state in which it sits, and will administer the same justice which the state court would administer between the same parties.

Other cases to the same effect are:

J. Bacon & Sons v. *James W. Martin*, 305 U. S. 380;

Alton Railroad Company v. *Illinois Commerce Commission*, 305 U. S. 548;

Texarkana v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188;

Six Companies of California v. *Joint Highway District*, 85 L. Ed. (Advance Sheet) 159;

West v. *American Teleph. & Teleg. Co.*, 85 L. Ed. (Advance Sheet) 146; and

Fidelity Union Trust Co. v. *Ethel Field*, 85 L. Ed. (Advance Sheet) 176.

There is no difference of opinion between the Federal Courts upon the question involved in this case. This action relates to the title to property that is fixed and immovable, which has been improved under the authority of state laws. Every step of said improvement, and every law involved, has been passed upon by the Supreme Court of Kansas, and the action of the City in making the

improvements has been found to be a valid exercise of administrative power.

McAlpine v. *Railway Co.*, 68 Kan. 207, 75 Pac. 73.
Kansas City v. *Wyandotte County*, 117 Kan. 41, 230 Pac. 79.
State ex rel. v. *Kansas City*, 140 Kan. 471, 37 Pac. 2d 18.
Robertson v. *Kansas City*, 143 Kan. 726, 56 Pac. 2d 1032.
State ex rel. v. *Kansas City*, 149 Kan. 252, 86 Pac. 2d 476.
State ex rel. v. *Kansas City*, 151 Kan. 2, 98 Pac. 2d 101.
State ex rel. McDowell v. *McCombs*, 156 Kan. (Advance Sheet) 391.
United States v. *U. P. R. R. & Kansas City*, 32 Fed. Supp. 917, 313 U. S. 450, 85 L. Ed. 1453.
Swope et al. v. *Kansas City, Kansas, et al.*, 32 Fed. Supp. 917, 132 F. 2d 788.

In *Union Pacific R. R.* v. *U. S.*, 313 U. S. 450, 85 L. Ed. 1453 (l. c. U. S. 467, L. Ed. 1467), the Supreme Court of the United States said:

> "The judgment of the Supreme Court of Kansas in *State ex rel. Parker* v. *Kansas City* (151 Kan. 2, 98 Pac. 101) that the City, in its proprietary capacity, under Kansas law has 'authority * * * to carry out * * * such policies and transactions as may be to the best interests of said city * * *' is not reviewable here."

Petitioners on page 23 of their brief state:

> "The opinion of the Circuit Court of Appeals conflicts with the opinion of *Juneau Ferry Co.* v. *Morgan*, 236 Fed. 204 (9th Cir.), where the court said: * * *"

and the petitioners quote only a portion of a paragraph taken from the opinion of the court.

We set out in full the paragraph from which petitioners quote only a portion (l. c. 206):

> "The rule is that the power to lease corporate property held by a municipality for public use cannot ordinarily be wholly or partly diverted to a possession or use exclusively private *without specific legislative authority*, and that a town cannot lease a part of a public dock to a private concern, nor can a city which has condemned private property for use as a wharf lease it unconditionally for a term of years to be used in the prosecution of private business and for private gain."

It is to be noted that the court said that *without specific legislative authority* a town could not lease a part of a public dock.

In the instant case, Kansas City, Kansas, had *specific legislative authority* to construct the improvements on the Public Levee and *to lease the same* under the provisions of chapter 43, Laws of Kansas, 1933, Special Session, and Chapter 135, Laws of Kansas, 1937. The opinion in the Circuit Court of Appeals in our opinion does not conflict with *Juneau Ferry Co.* v. *Morgan.*

On page 24 of their brief, petitioners state that the opinion of the Circuit Court of Appeals recites that the Levee tract has grown by accretion to several times its original size, and there is not a trace of evidence in the record to sustain this assertion.

On page 13 of their brief filed in the Circuit Court of Appeals, petitioners make the following statement:

> "It is true that accretions have added to the original subject of this dedication."

An examination of plaintiff's Exhibit 1 (page 54 of the record), which shows the Public Levee as originally

platted, and an examination of Exhibit 4 (page 77 of the record), shows the size of the Levee at the time the improvements were constructed by the City of Kansas City, Kansas, thereon. Both of these Exhibits are drawn on practically the same scale. It is clear, from an examination of each of them, that the Public Levee has grown to several times its original size.

In the case of *Kansas City* v. *Wyandotte County,* 117 Kan. 141, 230 Pac. 79, this same tract of land was before the Supreme Court, in which case the Kansas Supreme Court held the Levee tract had grown in acreage to many times its original extent.

On pages 24 and 25 of their brief, petitioners state:

> "The opinion below states that petitioners claim to be seized of such reversionary title. The petitioners never made any claim other than that they ought in equity and good conscience to be paid the ground value of the land diverted."

In their complaint, petitioners allege:

> "4. That these plaintiffs are seized of such reversionary title in said 'Levee' as was held by some of the said dedicators, from whom such title passed to these plaintiffs through immediate or mesne testamentary devisees, or by the Kansas laws of descent and distribution and dower" (R. 9).

In their prayer, petitioners prayed the court to enter an order to determine whether or not plaintiffs are entitled to assert a reverter to parts of the Levee (R. 12).

Respondents assert that the Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable local decisions, nor did the Circuit Court of Appeals render a decision in

conflict with the decision of another Circuit Court of Appeals on the same matter, nor did the Circuit Court of Appeals decide a federal question in a way probably in conflict with an applicable decision of this court. Respondents submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

ALTON H. SKINNER,
City Attorney,
JOSEPH A. LYNCH,
Deputy City Attorney,
Both of Kansas City, Kansas,

Counsel for Respondents and Appellees Below, Kansas City, Kansas, a Municipal Corporation, Roy Wheat, Frank Brown and Frank H. Holcomb, County Commissioners of Wyandotte County, Kansas, and The Minnesota Avenue, Inc., a Corporation.